Supreme Court, U. S.
FILED
JUN 22 1979
MICHAEL RODAK, JR., CLERK

No. 78-1520

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALABAMA HOSPITAL ASSOCIATION, ET AL.,
PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioners provide medical services to beneficiaries of the federal Medicare program. They seek review of the judgment of the court of appeals, holding that district courts lack jurisdiction to review reimbursement determinations made by the Secretary of Health, Education, and Welfare under the Medicare Act, 42 U.S.C. 1395 *et seq.*

1. Petitioners represent a class of private and non-federal governmental hospitals in Alabama that provide Medicare services to Medicare patients. These hospitals are entitled to reimbursement for the reasonable cost of performing such services. Respondent Blue Cross is the

"fiscal intermediary" chosen by petitioners to transmit reimbursement payments provided by HEW under the Act (Pet. App. A-1). This dispute arose when Blue Cross conducted an audit of petitioners' files and determined that $657,000 had been paid to petitioners between 1967 and 1972 for services that were medically unnecessary and therefore not covered by the Medicare program. Petitioners were notified of this determination but were not afforded a hearing prior to the final administrative decision to recoup the overcharges.

Thereafter either petitioners repaid the overcharges or Blue Cross withheld payments for future services as a set-off. Petitioners then brought this action seeking return of the $657,000, contending that the failure to afford them an administrative hearing prior to recoupment deprived them of property without due process of law.

2. The district court ruled in petitioners' favor and ordered the Secretary to repay the amounts disallowed by Blue Cross or provide an evidentiary hearing on petitioners' claims within a reasonable time (Pet. App. A-11).

The court of appeals reversed, holding that the district court had no jurisdiction in this case. The court reached this conclusion in reliance on its prior decisions in *Dr. John T. MacDonald Foundation, Inc.* v. *Califano*, 571 F. 2d 328 (5th Cir.) (en banc), cert. denied, No. 78-88 (Oct. 10, 1978), and *American Association of Councils of Medical Staffs of Private Hospitals, Inc.* v. *Califano*, 575 F. 2d 1367 (5th Cir. 1978), cert. denied, No. 78-563 (Jan. 15, 1979). In those cases, the court held that district courts lack jurisdiction to review actions taken by the Secretary under the Medicare Act with respect to pre-1974 services because Section 1872 of the Act, 42 U.S.C. 1395*ii*, incorporates Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), which provides that:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

Because no other portion of the Medicare Act provides for judicial review of the Secretary's reimbursement determinations for pre-1974 services, the court of appeals concluded that the district court lacked jurisdiction to review the Secretary's decision in this case.[1] See *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975).

Although the district court lacked jurisdiction in this case, the court of appeals noted (Pet. App. A-2 to A-3) that petitioners are not precluded from seeking adjudication of their claims in the Court of Claims. The Court of Claims has held in *Whitecliff, Inc.* v. *United States*, 536 F. 2d 347 (1976), cert. denied, 430 U.S. 969 (1977), that it has jurisdiction to award money damages under 28 U.S.C. 1491 for claims brought under the Medicare Act. The court of appeals therefore transferred the action to the Court of Claims (Pet. App. A-3 to A-4).

3. This petition raises essentially the same issues that were presented in *Dr. John T. MacDonald Foundation, Inc.*, *supra*, and in *American Association of Councils of Medical Staffs of Private Hospitals supra*. For the same reasons that the petitions were denied in these cases,

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[1] The Medical Act was amended as of October 31, 1972, to allow all providers of Medicare services to obtain a hearing and judicial review with respect to any reimbursement determinations made by the fiscal intermediary for accounting periods concluding on or after June 30, 1973. 42 U.S.C. 1395*oo*. The question presented in this petition thus has significance only for controversies that concern reimbursement for Medicare services that were provided prior to June 30, 1973. The parties stipulated that this case does not involve transactions occurring after October 31, 1972 (Pet. App. A-13).

review should be declined in this case as well.[2].

Contrary to petitioners' assertion, the court of appeals did not hold that the Medicare Act "precluded any federal court anywhere from deciding a claim" of this type (Pet. 10). Instead, the court of appeals transferred this case to the Court of Claims, which has concluded in *Whitecliff*, *supra*, that it has jurisdiction under 28 U.S.C. 1491 to award money damages in suits brought under the Medicare Act (Pet. App. A-2 to A-3).[3] Petitioners' contention that the Act is unconstitutional because it totally precludes judicial review of the Secretary's actions therefore is not properly presented in this case.[4] As the court stated in *MacDonald*, *supra*, 571 F. 2d at 332 (emphasis in original):

[2]We are sending petitioners a copy of our briefs in response to the petitions in *MacDonald* and *American Association*.

[3]The United States does not believe that *Whitecliff* was correctly decided. But until that decision is modified or overruled, petitioners' argument that the Act unconstitutionally precludes review of the Secretary's actions is incorrect.

[4]For the same reason, petitioners' claim that mandamus jurisdiction lies in the district court under 28 U.S.C. 1361 is incorrect. Mandamus is an "extraordinary remedy" which may not be invoked unless there is "no other adequate remedy available." *Carter* v. *Seamans*, 411 F. 2d 767, 773 (5th Cir. 1969). An action in the Court of Claims is plainly an adequate remedy in a case such as this, where petitioners seek the return of a definite sum of money. Moreover, the limitations on jurisdiction to review the Secretary's decisions under Section 205(h) of the Social Security Act, as incorporated by Section 1872 of the Medicare Act, apply to mandamus jurisdiction as well as to general federal question jurisdiction. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757. Questions concerning the extent of mandamus jurisdiction were pretermitted in *Califano* v. *Yamasaki*, No. 77-1511, (June 20, 1979), but it is unnecessary to address them in this case because of the availability of jurisdiction in the Court of Claims.

> Happily, we need resolve neither Congress' intent to preclude review of constitutional claims nor the constitutionality of a statute so construed. We would face these issues only if *all* avenues of review were precluded.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

DOJ-1979-06